Universiti Sains Malaysia v Ku Zilati bt Ku Shaari & Ors and another suit

HIGH COURT (PENANG) — CIVIL SUIT NOS 22–610 OF 2010 AND 22–611 OF 2010
KENNETH ST JAMES JC
5 DECEMBER 2022

Civil Procedure — Setting aside — Default judgment — Whether judgment entered against defendant was regular — Whether defendant had shown defence on the merits to warrant setting aside of the judgment — Whether defendant had failed to explain inordinately long delay of ten years in applying to set aside the judgment

The first defendants in the two cases herein, who were a married couple, were fellowship scholarship students of the plaintiff ('USM'). Under the scholarship agreements, they were required to serve USM for seven years upon graduation. Following their graduation, the defendants began work with USM but resigned from their jobs within a few months. USM sued both the defendants for breach of the scholarship agreements and sought repayment of the monies it had expended on them with interest. USM entered judgments in default of appearance against both the defendants and thereafter commenced bankruptcy proceedings against them. The bankruptcy proceedings were withdrawn when the defendants entered into settlement arrangements with USM but the proceedings were re-filed when the defendants defaulted. About ten years after the default judgments were entered, the defendants filed respective applications to set them aside. Since both the cases herein were premised on common facts, the setting-aside applications were heard together and it was agreed by all parties that the decision in Ku Zilati bt Ku Shaari's case ('Ku Zilati') would bind her husband, Mokhtar bin Awang, in the other suit. In her application, Ku Zilati claimed that she was not served with the writ and statement of claim and that was the reason she did not enter an appearance in the action.

Held, dismissing the application:

(1) The default judgment against Ku Zilati was regularly obtained as the documentary evidence overwhelmingly showed that the writ and statement of claim were properly served on her. It was therefore imperative for her to exhibit a draft defence containing a defence on the merits or to show a defence on the merits in her affidavit. The defendant did not exhibit any such draft defence. The averment in her affidavit that she had a good defence was merely a bare statement that failed to

condescend to particulars. The defendant's averments did not amount to a defence on the merits. She had not produced an arguable or triable issue that warranted the setting aside of the default judgment (see paras 53–54 & 71).

(2) There was unreasonably long delay (of almost ten years) on the defendant's part in applying to set aside the default judgment after the same was served on her and the delay was not acceptably explained. Under O 42 r 13 of the Rules of Court 2012 a defendant must apply to set aside a judgment within 30 days of receipt of same. Any delay beyond that period had to be cogently explained (see paras 65–68 & 71).

(3) There was no inordinate delay on USM's part in executing the judgment. Any delay was the result of the defendant's own doing in first agreeing to a repayment scheme to settle the matter, thereafter making some payments and then defaulting again. This conduct caused USM to withdraw its bankruptcy proceedings against her twice (see paras 55–57).

[Bahasa Malaysia summary

Defendan pertama dalam kedua-dua kes di sini, yang merupakan pasangan suami isteri, adalah pelajar biasiswa fellowship plaintif ('USM'). Di bawah perjanjian biasiswa, mereka dikehendaki berkhidmat di USM selama tujuh tahun selepas tamat pengajian. Selepas tamat pengajian, defendan mula bekerja dengan USM tetapi meletak jawatan dalam tempoh beberapa bulan. USM menyaman kedua-dua defendan kerana melanggar perjanjian biasiswa dan meminta pembayaran balik wang yang telah dibelanjakan untuk mereka dengan faedah. USM memasukkan penghakiman ingkar terhadap kedua-dua defendan dan selepas itu memulakan prosiding kebankrapan terhadap mereka. Prosiding kebankrapan telah ditarik balik apabila defendan membuat perjanjian penyelesaian dengan USM tetapi prosiding difailkan semula apabila defendan ingkar. Kira-kira sepuluh tahun selepas penghakiman ingkar dimasukkan, defendan memfailkan permohonan masing-masing untuk mengenepikannya. Memandangkan kedua-dua kes di sini adalah berdasarkan fakta bersama, permohonan mengetepikan didengar bersama dan dipersetujui oleh semua pihak bahawa keputusan dalam kes Ku Zilati bt Ku Shaari ('Ku Zilati') akan mengikat suaminya, Mokhtar bin Awang, dalam tindakan lain. Dalam permohonannya, Ku Zilati mendakwa beliau tidak diserahkan writ dan pernyataan tuntutan dan itu adalah sebabnya beliau tidak hadir dalam tindakan tersebut.

Diputuskan, menolak permohonan:

(1) Penghakiman ingkar terhadap Ku Zilati selalu diperolehi sebagai bukti dokumentari menunjukkan bahawa writ dan pernyataan tuntutan telah disampaikan dengan sewajarnya kepadanya. Oleh itu, adalah penting baginya untuk mengeksibitkan draf pembelaan yang mengandungi

pembelaan atas merit atau menunjukkan pembelaan mengenai merit dalam afidavitnya. Defendan tidak mengekshibitkan sebarang draf pembelaan sedemikian. Penyataan dalam afidavitnya bahawa beliau mempunyai pembelaan yang baik hanyalah kenyataan kosong yang gagal menjelaskan butirannya. Penyataan defendan tidak sama dengan pembelaan atas merit. Beliau tidak mengemukakan isu yang boleh dipertikaikan atau boleh dibicarakan yang mewajarkan untuk mengetepikan penghakiman ingkar (lihat perenggan 53–54 & 71).

(2) Terdapat kelewatan yang tidak munasabah yang panjang (hampir sepuluh tahun) di pihak defendan dalam memohon untuk mengetepikan penghakiman ingkar selepas perkara yang sama disampaikan kepadanya dan kelewatan tersebut tidak dijelaskan dengan wajar. Di bawah A 42 k 13 Kaedah-Kaedah Mahkamah 2012 defendan mesti memohon untuk mengetepikan penghakiman dalam tempoh 30 hari dari tarikh yang sama. Sebarang kelewatan melebihi tempoh tersebut perlu dijelaskan dengan teliti (lihat perenggan 65–68 & 71).

(3) Tiada kelewatan yang melampau di pihak USM dalam melaksanakan penghakiman. Sebarang kelewatan adalah hasil daripada tindakan defendan sendiri terlebih dahulu bersetuju dengan skim pembayaran balik untuk menyelesaikan perkara tersebut, selepas itu membuat beberapa pembayaran dan kemudian ingkar semula. Tindakan ini menyebabkan USM menarik balik prosiding kebankrapan terhadapnya dua kali (lihat perenggan 55–57).]

Cases referred to

Fira Development Sdn Bhd v Goidwin Sdn Bhd [1989] 1 MLJ 40; [1989] 1 CLJ 1, SC (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565; [1997] 3 CLJ 305; [1997] 3 AMR 2458, FC (refd)

Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd [2008] 2 MLJ 348; [2008] 3 AMR 281; [2008] 3 CLJ 273, CA (refd)

Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326; [2003] AMEJ 0063, HC (refd)

Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu Construction & Engineering Sdn Bhd [2014] 1 MLJ 422; [2013] 1 LNS 312, CA (refd)

Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 3 AMR 576; [2008] 4 CLJ 175, CA (folld)

Legislation referred to

Rules of Court 2012 O 41 r 13, O 42 r 13

S Kartikumar (Ghazi & Lim) for the plaintiff.
Mustaqim Huzaini (Ram Reza & Muhammad) for the defendant.

Kenneth St James JC:

PRELUSION

[1] The plaintiff (USM) gave fellowship scholarships to two of its students. For the scholarships, the students were bound to serve USM, after they graduated, for seven years. Respective fellowship agreements were signed. In time, the two students attained their fellowships. They reported for work. But within a few months, they resigned. USM then sued them under the fellowship agreements. The pertinent consequence for breaching the fellowship agreements was that the students became liable to pay USM all the monies that USM had expended on them, with interest.

[2] As the students did not enter appearances to the writs, respective judgments in default of appearance were entered against them. After that, USM executed the judgments, by taking bankruptcy proceedings against the students. There was negotiation communication between the students and USM. As a result, USM withdrew the first bankruptcy proceeding.

[3] Years passed. As the students did not satisfactorily fulfill the settlement arrangement, USM executed the default judgments again. As required by law, USM obtained the leave of court to execute the judgments after six years have passed since the judgments were entered. USM again filed bankruptcy proceedings. This time, the students filed respective applications to set aside the default judgments. Should the judgments be set aside?

BOTH APPLICATIONS TO SET ASIDE ARE HEARD AND DETERMINED TOGETHER

[4] I will refer to Penang High Court Civil Suit No 22–610 of 2010 against Ku Zilati bt Ku Shaari (the first defendant) and the two guarantors, as Suit 610. I will similarly refer to Penang High Court Civil Suit No 22–611 of 2010 against Mokhtar bin Awang (also the first defendant in that suit) and the same two guarantors, as Suit 611.

[5] It is appropriate for both applications to set aside the respective default judgments in Suit 610 and Suit 611 to be heard together. Both the fellowship agreements contained the *same terms*, such that both the first defendant's obligations to USM were the same. Both the fellowship agreements were entered into on the *same date*. The address stated for both the respective first defendant in both the fellowship agreements was the *same address*.

[6] The first defendant in Suit 610 and the first defendant in Suit 611 are wife and husband. The communication over the years between them and USM

were also done, by-and-large, as one (together). The only difference that is relevant to note is that the respective judgment sums are different.

[7] Further, I asked counsel for both sides about this at the hearing, and they agreed that both the applications to set aside should be heard together, and that my decision on the application in Suit 610 will bind the parties in the application in Suit 611. The parties also agreed that they would make references only to the averments and exhibits in Suit 610.

[8] And so, I will write one judgment for both applications.

THE PERTINENT FACTS AND CHRONOLOGY

[9] As there were communication and documentation over a period of approximately 20 years, it is helpful to summarise the pertinent facts and chronology, as disclosed in the documentary evidence.

[10] On 2 June 2000, the fellowship agreement was entered into.

[11] Clause 4(g) of the fellowship agreement obligates the first defendant to serve (work for) USM, after graduation, for no fewer than seven years from the date that she first reports for work.

[12] Clause 8 of the fellowship agreement provides that if the first defendant leaves USM before the end of the seven-year period, she is to pay USM damages that include all the monies that USM has spent on her, as well as the compoundable interest on any amount that is due.

[13] On 4 February 2008, after graduation, the first defendant reported to work at USM, as a lecturer.

[14] But on 6 May 2008 (a mere three months later), the first defendant resigned from her position.

[15] On 10 July 2008, USM demanded for the amount due from the first defendant.

[16] On 25 August 2010, USM filed these two suits. By their solicitor's letter of 6 September 2010, USM served the writ and statement of claim on the first defendant. USM sent the writ and statement of claim, by AR Registered Post, to the first defendant's address at: 182, Jalan Kempas 2, Taman Kempas, 08000 Sungai Petani, Kedah (Taman Kempas address). This Taman Kempas address is the first defendant's address that is stated in the fellowship agreement. I will

refer to this cover letter serving the writ and statement of claim as 'USM's writ service letter'.

[17] USM exhibited the Pos Malaysia Bhd statement and receipt dated 7 September 2010, which proves that USM's writ service letter was sent by AR Registered Post to the first defendant's Taman Kempas address.

[18] By her letter of 21 September 2010, which was marked 'Without Prejudice', the first defendant *responded to* USM's writ service letter. In her letter, the first defendant *referred to* USM's writ service letter. She also stated the Taman Kempas address as her address.

[19] As her letter was marked 'Without Prejudice', I do not consider the content of the letter. But I can take cognisance of the fact that the first defendant responded to USM's writ service letter, and that she stated the Taman Kempas address as her address. I therefore find, on the balance of probabilities, that the Taman Kempas address was the correct address to use to serve the writ and statement of claim on her. And that she in fact received the writ and statement of claim.

[20] By their solicitor's letter of 11 October 2010, USM replied to the first defendant's letter of 21 September 2010, advising her that she must enter an appearance within the time-limit given, and that if she did not, judgment would be entered against her, and execution proceedings will ensue.

[21] The first defendant in turn *responded to* USM's solicitor's letter of 11 October 2010, with two letters. The first letter was her letter of 26 October 2010. The second letter was her letter of 23 November 2010. Both letters were marked 'Without Prejudice'. But both letters *referred to* USM's solicitor's letter of 11 October 2010. And in both letters, the first defendant again wrote the Taman Kempas address as her address.

[22] In the same vein, even though I do not consider the content of these two letters, I find, on the balance of probabilities, that the Taman Kempas address was the proper address to use to communicate with the first defendant, and that she responded to USM's solicitor's letter of 11 October 2010.

[23] On 6 July 2011, USM entered judgment in default against the first defendant.

[24] By their solicitor's letter of 21 July 2011, USM sent the sealed judgment, by Registered Post and Certificate of Posting, to the first defendant, again to the Taman Kempas address. I will refer to this cover letter serving the

judgment as 'USM's judgment service letter'.

[25] USM, as before, exhibited the Pos Malaysia Bhd statement and receipt dated 22 July 2011, which proves that USM's judgment service letter was sent by Registered Post and Certificate of Posting to the first defendant's Taman Kempas address.

[26] The first defendant *responded to* USM's judgment service letter, by her letter of 20 September 2011, which *referred to* USM's judgment service letter. Her letter was again marked 'Without Prejudice'. This was a letter issued jointly with her husband.

[27] Again, although I do not consider the content of her letter of 20 September 2011, I make a finding of fact, on the balance of probabilities, that she received the judgment through USM's judgment service letter.

[28] More than four years later, on 1 December 2015, USM issued the first bankruptcy notice ('BN') against the first defendant.

[29] By their solicitor's letter of 9 December 2015, USM purported to serve the first BN on the first defendant by hand. USM exhibited this cover letter, which contained an acknowledgment of service in the form of an illegible signature, but with a clearly hand-written NRIC number — '710103025494'. This is the first defendant's NRIC number (it is pertinent to note that on the cover letter serving the first BN issued against her husband, there was similarly an acknowledgment of service with a signature and a handwritten NRIC number — '710710115547' — which is the husband's NRIC number).

[30] On 10 June 2016, USM filed the creditor's petition ('CP') against the first defendant. USM purported to serve the CP on the first defendant, again by hand. USM similarly exhibited this cover letter, which also contained an acknowledgment of service in the form of a signature, with a clearly hand-written NRIC number — the first defendant's NRIC number (similarly, on the cover letter serving the CP on her husband, there was also an acknowledgment of service with a signature and the husband's NRIC number written on it).

[31] There was further written negotiation communication between the first defendant and USM in July and August 2016.

[32] In September 2016, USM withdrew the first bankruptcy proceeding against the first defendant.

[33] The next documented communication came two years later. By their solicitor's letter of 28 June 2018, USM notified the first defendant that she was in arrears of her instalment payments. USM demanded that she pays the arrears, or execution proceedings would again be taken against her.

[34] In August 2020, USM applied for leave to execute the judgment after six years have passed from the date of the judgment. USM purported to serve the application for leave and the affidavit in support of the application on the first defendant. USM's solicitor's cover letter of 2 September 2020, serving the application and the affidavit in support contained an acknowledgment signature with the first defendant's NRIC number written on it (it was the same for the cover letter serving these cause papers on the husband. There was an acknowledgment signature and his NRIC number written on it).

[35] On 6 October 2020, USM obtained the order for leave to execute the judgment (after six years have passed from the judgment date).

[36] Two months later, on 31 December 2020, USM issued the second BN against the first defendant.

[37] As before, USM purported to serve this second BN on the first defendant. By their solicitor's letter of 6 January 2021, USM served, by hand, this second BN on the first defendant. USM exhibited this cover letter, which again contained an acknowledgment of service in the form of a signature, with the first defendant's hand-written NRIC number written on it (it is the same for the cover letter serving the second BN on the husband).

[38] In January and February 2021, there were pertinent communication emanating from the first defendant's husband that relates to both of them. This communication, which were *not marked 'Without Prejudice'*, in my judgment, tantamount to an admission of the judgment debt by both of them. The communication include these statements that I am citing below:

(a) by email of 24 January 2021: 'Kami menerima dokumen dari firma Ghazi & Lim baru-baru ini' (Ghazi & Lim are USM's solicitors. They were tasked with serving the relevant cause papers) and '... kami merayu kepada pihak USM agar menarik balik notis kebankraban [sic] dan menawarkan penyelesaian *one-off* yang mampu kami bayar';

(b) by email of 25 January 2021: 'Kami memohon sekali lagi supaya pihak USM dapat menawarkan rebet yang mampu kami bayar secara *one-off*';

(c) by email of 31 January 2021: 'Ingin dijelaskan bahawa kami berdua berhasrat hendak menyelesaikan kes ini secepat mungkin';

(d) by email of 15 February 2021: 'Dilampirkan bukti pembayaran (Mokhtar Awang) untuk tindakan dan rujukan pihak Puan. Untuk Ku Zilati, kami akan buat pembayan [sic] esok'; and

(e) by email of 16 February 2021: 'Bukti pembayaran Ku Zilati disertakan dalam attachment untuk tindakan dan rujukan pihak USM'.

[39] On 24 February 2021, USM discontinued the second bankruptcy proceeding against the first defendant.

[40] On 2 March 2021, both the first defendants filed their respective applications to set aside the default judgments.

THE APPLICABLE PRINCIPLES

[41] The principles governing an application to set aside a default judgment are well settled. If the default judgment was obtained irregularly, the irregularity is enough to set aside it aside. The default judgment should be set aside 'as of right' or 'as a matter of right'. The Latin expression is *ex debito justiciae*.

[42] But if the default judgment was obtained regularly, then the first defendant must file an affidavit of merits, which must disclose a defence on the merits, and that the first defendant has an arguable or triable issue on the merits: *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305; [1997] 3 AMR 2458.

[43] The Federal Court in *Lai Yoke Ngan* propounded it this way (at pp 573–574 (MLJ)):

> The principle of setting aside a default judgment under O 13 r 8 has been well established and needs no detailed repetition. What is important to observe is that a default judgment is not a judgment on the merits. Accordingly, when such judgment is obtained irregularly, such irregularity would be a sufficient ground by itself for setting it aside. But where the default judgment has been obtained regularly, in order to succeed, *the defendant must file an affidavit of merits*, ie the defendant must disclose by affidavit evidence that prima facie he has a defence on the merits. Put in another way, *the affidavit must disclose that he has an arguable or triable issue on the merits* (see *Evans v Bartlam* [1937] AC 473) ... (Emphasis added.)

[44] A defence on the merits means raising 'an arguable or triable issue': *Fira Development Sdn Bhd v Goidwin Sdn Bhd* [1989] 1 MLJ 40; [1989] 1 CLJ 1.

[45] And to disclose a defence with merits, a draft defence should be filed: *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng*

Construction Sdn Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326; [2003] AMEJ 0063.

[46] In *Pengkalen Concrete*, His Lordship Justice Suriyadi Halim Omar puts it like this (at MLJ pp 74–75):

> The next ingredient to be established by the defendants was whether there was a defense of merit before me for consideration, ie. by at least filing their draft defences …
>
> In the current case, it was indisputable that *the defendants had failed to produce that all important draft statements of defence. Without them, I was thus without any option but to find again for the plaintiff* … Common sense would convince anyone that to allow the appeal, and set aside a default judgment when no prima facie defence worthy of consideration was before the court, would portray the court as a lame duck prolonging the agony of all parties. *Without them before me, I could only conclude that the defendants were definitely not serious in their attempts to challenge the plaintiff* …

WAS THE DEFAULT JUDGMENT REGULARLY OBTAINED?

[47] The first issue to determine is whether the default judgment was regularly obtained. Put differently, on the facts of these two suits — was the writ and statement of claim properly served on the first defendant?

[48] The first defendant avers (swears on oath) that:

(a) USM failed to serve the writ and statement of claim on her;

(b) the Taman Kempas address was not her residential address, nor was it her address for service. She swore that the Taman Kempas address 'bukan alamat kediaman dan/atau alamat penyampaian saya'; and

(c) she did not enter an appearance because she did not receive the writ and statement of claim.

[49] Testing the first defendant's averments against the documentary evidence and USM's averments, I find that the first defendant's averments are unconvincing.

[50] Unfavourable to the first defendant, I find, on the balance of probabilities, that USM's writ and statement of claim were properly served on the first defendant, for the following reasons:

(a) the Taman Kempas address was the address stated in the fellowship agreement as the first defendant's address;

(b) USM produced the Pos Malaysia statement and receipt to prove that the writ and statement of claim were sent by AR Registered Post to the first defendant's Taman Kempas address, under the cover of USM's writ service letter (dated 6 September 2010);

(c) by her letter of 21 September 2010, the first defendant *responded to* USM's writ service letter, which proves that the first defendant received the writ and statement of claim. In this letter of 21 September 2010, the first defendant wrote the Taman Kempas address as her address; and

(d) USM replied to the first defendant's letter of 21 September 2010, by their solicitor's letter of 11 October 2010. The first defendant *in turn responded* to USM's solicitor's letter of 11 October 2010, by her letters of 26 October 2010 and 23 November 2010. And in both these reply-letters, the first defendant similarly wrote the Taman Kempas address as her address. This reinforces my finding of fact that the first defendant received the writ and statement of claim, as well as USM's solicitor's letter of 11 October 2010, at her Taman Kempas address.

[51] Since I find that the first defendant received service of the writ and statement of claim, and the first defendant failed to enter appearance as she was required to do, I hold that the default judgment was regularly obtained.

DID THE FIRST DEFENDANT DISCLOSE A DEFENCE ON THE MERITS TO WARRANT THE SETTING ASIDE OF THE DEFAULT JUDGMENT?

[52] Since the default judgment was regularly obtained, the next issue to determine is whether the first defendant disclosed a defence on the merits to warrant the default judgment to be set aside.

[53] On this issue of a defence on the merits, the first defendant does not produce a draft defence for the court to consider. Instead, she makes these averments:

(a) since 2019, she has been in communication with the USM legal counsel Puan Hanum Muhamad Shkir about the arrears due in the fellowship agreement. She had on several occasions discussed the arrears due with USM, but USM in mala fide proceeded to take legal action against her;

(b) she moved from USM to the Universiti Teknologi Petronas (UTP). The Ministry of Higher Education can extinguish the balance of her loan (scholarship) by transferring her service contract to UTP as a reciprocal action between Petronas and the Government of Malaysia (I find, however, that she does not disclose any evidence to support this assertion,

not even any evidential material that infers that she could rely on this alleged arrangement between USM and UTP, as her defence to USM's claim); and

(c) she has a defence on the merits which has a good prospect of succeeding: 'saya mempunyai pembelaan yang bermerit dengan prospek kejayaan yang tinggi' (but I find that it remains a bare statement. She does not condescend to any particulars to substantiate this statement).

[54] I find that these averments do not tantamount to a defence on the merits. The first defendant has not produced an 'arguable or triable issue' that warrants setting aside the default judgment.

WAS THERE A DELAY BY USM, OR BY THE FIRST DEFENDANT?

[55] Another issue that is relevant to the application to set aside is the issue of delay. The first defendant asserts that USM, in bad faith, committed an inordinate delay of 156 months before executing on the judgment, and that USM did this in order to recover a higher interest amount from the first defendant, even though she was still discussing a settlement with USM.

[56] In reply to this assertion, USM avers that:

(a) it was the first defendant who asked to pay the amount due by instalments. After some payments, the first defendant stopped paying and went into default in 2014. That was when USM took out the first bankruptcy proceeding against her. In 2016, the first bankruptcy proceeding was withdrawn on the first defendant's promise to resume paying;

(b) then in 2018, the first defendant went into default again. In 2020, USM obtained the leave of court to execute after six years have passed from the date of the judgment. And in 2020, USM took out the second bankruptcy proceeding against the first defendant. After further negotiations, resulting in the first defendant paying up the amount in arrears, USM withdrew the second bankruptcy proceeding; and

(c) in other words, the alleged delay of 156 months was a result of the first defendant's own doing.

[57] In any event, since USM obtained the court's leave to execute after six years have lapsed, and since the prolonged lapse of time was USM's forbearance from executing the judgment because of the first defendant's own default and request — I find that there was no inordinate delay on USM's part.

[58] Conversely, USM asserts that there is an unexplained delay by the first

defendant in filing her application to set aside the default judgment.

[59] In this context, the first defendant first alleges that USM kept the fact of the judgment from her for 156 months. In other words, USM did not inform the first defendant about the judgment for 156 months. The first defendant also alleges that she got to know about the judgment *only when the second BN was served on her*, which was in *January 2021*. She alleges that as soon as she knew about the judgment through the second BN — 'sebaik saja saya mendapat tahu berkenaan dengan Penghakiman tersebut melalui Notis Kebankrapan' — she filed the application to set aside the judgment. I am, however, compelled to note here that the first defendant filed the setting aside application only in *March 2021*.

[60] USM substantiates their assertion that the first defendant had inordinately delayed filing her application to set aside the judgment, by making these averments:

(a) by USM's judgment service letter (dated 21 July *2011*), USM sent the sealed judgment to the first defendant's Taman Kempas address in 2011. I note here that this was about *ten years before* the service of the second BN in *2021*;

(b) the Pos Malaysia Bhd statement and receipt dated 22 July 2011, proves that USM's judgment service letter was sent by Registered Post and Certificate of Posting to the Taman Kempas address; and

(c) the first defendant *responded to* USM's judgment service letter, by her letter of 20 September 2011, which shows that the first defendant received USM's judgment service letter *and the judgment*, in 2011.

[61] I find USM's assertions about the first defendant's unexplained delay to be credible.

The legal principles on delay in applying to set aside a default judgment

[62] The guiding principle about delay is that delay is a factor to be considered when deciding whether to grant or refuse an application to set aside the default judgment: *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 3 AMR 576; [2008] 4 CLJ 175.

[63] How long was the delay in applying to set aside a default judgment is a relevant and important factor to consider when exercising the discretion to set aside the judgment. If the first defendant does not act 'with reasonable promptitude', the court should not favour the first defendant: *Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd* [2008] 2 MLJ 348; [2008] 3 AMR

281; [2008] 3 CLJ 273.

[64] In *Mirra*, the Court of Appeal held:

> [7] Nonetheless, I shall venture to add that *the respondent was also guilty of delay in applying to set aside the default judgment. Under O 42 r 13 of the Rules of the High Court 1980 ('the RHC'), the respondent is required to apply to set aside the default judgment within 30 days from the date of receipt of the judgment order. This, the respondent failed to do within the prescribed time.* And by the time when this application was made, the appellant had taken a fresh step in filing a petition to wind up the respondent. *When the respondent had failed to act '(a) with reasonable promptitude, in other words within a reasonable time*; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O 2 r 2(i) of the Rules of the High Court 1980' — per Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd then the court should not come to his aid in setting aside the default judgment*). (Emphasis added.)

[65] Order 42 r 13 gives the first defendant 30 days from the receipt of the judgment to set it aside. It is a mandatory rule. Any delay beyond this 30-day rule must be cogently explained: *Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu Construction & Engineering Sdn Bhd* [2014] 1 MLJ 422; [2013] 1 LNS 312.

[66] In *Thye Ah Chai*, the Court of Appeal held:

> [6] *There is a plethora of authorities to the effect that O 42 r 13 is mandatory and that an applicant filing an application beyond the prescribed time limit is obliged to provide cogent reasons for any delay.* We need cite only one authority in support of this proposition. This court in the case of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 opined through the judgment of Gopal Sri Ram JCA (as he then was) in a case also involving an application to set aside a default judgment that:
>
> > *It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant.*
>
> *In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.* (Emphasis added.)

My finding on delay

[67] The default judgment was entered on 6 July 2011. I find, on the balance of probabilities, that the judgment was served on the first defendant in July 2011. But the first defendant applied to set aside the judgment in March 2021,

which was approximately *ten years* from the service of the judgment.

[68] I therefore find that first defendant has gone way beyond the 30-day rule mandated by O 41 r 13, and by binding authorities. More importantly, the first defendant did not satisfactorily explain the reasons for waiting ten years to apply to set aside the judgment.

THREE SWORN ASSERTIONS BY THE FIRST DEFENDANT THAT ARE INCREDIBLE

[69] I am behoved to point out that there are at least three sworn assertions that were made by the first defendant that are difficult to believe. These three assertions made by the first defendant are not only untenable, but are — on the balance of probabilities — *false*:

(a) the first defendant's assertion that she did not receive the writ and statement of claim (in September 2010);

(b) the first defendant's assertion that she could not enter an appearance because USM failed to serve on her the writ and statement of claim; and

(c) the first defendant's assertion that she only got to know about the default judgment when she was 'recently' served with the second BN (in January 2021).

[70] Untruthful averments such as these have cast much doubt on the first defendant's probity, when I consider to exercise my discretion to, or not to, set aside the default judgment.

CONCLUSION

[71] In conclusion, for the reasons alluded to above, I find that:

(a) the default judgment was regularly obtained, as the documentary evidence against the first defendant overwhelmingly point to the fact that the writ and statement of claim were properly served on the first defendant;

(b) the first defendant failed to disclose a defence on the merits in her affidavit averments, nor has she exhibited a draft defence containing a defence on the merits; and

(c) there was an unreasonably long delay in filing this application to set aside the judgment. And the near-decade-long delay was not acceptably explained.

[72] I therefore dismiss the first defendant's application to set aside the

judgment dated 6 July 2011 with costs of RM3,000 to be paid by the first defendant to USM by 6 December 2022. Costs are subject to the allocatur.

Application dismissed.

Reported by Ashok Kumar